LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-891

ANN ANASTASIA, ET AL.,

Petitioners,

vs.

COSMOPOLITAN NATIONAL BANK OF CHICAGO, ETC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ROBERT A. CREAMER,
EDWARD S. SILBER,
DENNIS M. WILSON,
KECK, CUSHMAN, MAHIN & CATE,
8300 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606,
312 876-3400,
Counsel for Respondents, Drake Hotel, Inc.; Palmer House Company; Hilton Hotels Corporation d/b/a The Conrad Hilton Hotel and 909 North Michigan Avenue Corporation d/b/a Continental Plaza.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

	PAGE
Citations	ii
Opinions below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions and Statutes	2
Statement	2
Argument	2
A. There Is No Conflict of This Decision of the Seventh Circuit Court of Appeals with the Decisions of Other United States Courts of Appeal	2
B. The Decision of the Seventh Circuit Court of Appeals Is Limited in Its Application to Illinois and Does Not Involve a Question of Federal Law Which Must Be Settled by This Court	7
C. The Issue of Unreasonable Search and Seizure Has Not Been Briefed or Argued Below and Should Not Be Considered by This Court	8
Conclusion	9

Citations.

Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973) 4

Barrera v. Security Building & Investment Corp., 519 F. 2d 1166 (5th Cir. 1975) 4

Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) 3, 7

Culbertson v. Leland, No. 73-1749 (9th Cir. Oct. 3, 1975) 3, 5, 6

Davis v. Richardson, 512 F.2d 201 (1st Cir. 1975) 3, 5

Fletcher v. Rhode Island Hospital Trust National Bank, 496 F.2d 927 (1st Cir. 1974) 5

Gibbs v. Titleman, 502 F.2d 1107 (3d Cir. 1974) 4

Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) 3, 4, 7

Jackson v. Metropolitan Edison Co., 419 U. S. 345 (1974) 3

Phillips v. Money, 503 F.2d 990 (7th Cir. 1974) 6

Hogan, The Innkeeper's Lien at Common Law, 8 Hastings L. J. 33 (1956) 5

Note, The Innkeepers Lien in the Twentieth Century 13 Wm. & Mary L. Rev. 175 (1971) 7

49 Am. Jur. 2d Landlord and Tenant § 675 (1970) .. 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-891

ANN ANASTASIA, ET AL.,

Petitioners,

vs.

COSMOPOLITAN NATIONAL BANK OF CHICAGO, ETC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois (App. A. to Petition) is unreported; and the opinion of the United States Court of Appeals for the Seventh Circuit (App. B. to Petition) is not yet reported.

JURISDICTION.

Jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Whether the actions of certain hotels in detaining property of non-paying guests in accordance with the Illinois Innkeeper's Lien Law constituted actions taken under "color of law" giving rise to a claim under 42 U. S. C. § 1983, or "state action" within the meaning of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES.

In addition to the following Illinois statute, the pertinent constitutional provisions and statutes are found in the Petition.

Ill. Rev. Stat. c.28, § 1 (1973) provides:

> "The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

STATEMENT.

Respondents adopt the statement of the case in the Petition.

ARGUMENT.

A. There Is No Conflict of This Decision of the Seventh Circuit Court of Appeals with the Decisions of Other United States Courts of Appeal.

Petitioners claim that there is a conflict between several United States Courts of Appeal on the question of whether actions taken pursuant to statutes granting innkeepers' liens

constitute actions under "color of law" for purposes of 42 U. S. C. § 1983 or "state action" under the Fourteenth Amendment to the United States Constitution.* They claim that the decisions that state action did not exist in this case and in *Davis* v. *Richmond*, 512 F.2d 201 (1st Cir. 1975) are in conflict with the decisions in *Culbertson* v. *Leland*, No. 73-1749 (9th Cir. Oct. 3, 1975) and *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970) where state action was found.

This Court, in establishing the standards to be applied in making state action analyses, has called for a sifting of facts and weighing of circumstances on a case by case basis. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722, 726 (1961). That this sifting and weighing should result in different conclusions under different circumstances does not mean that a conflict exists as to the concept of state action. Rather, it means that the courts have made the careful, individual analyses required by this Court to determine in each specific case whether the challenged actions constituted state action.

Two theories of state action have been proposed in this case. The first, the entwinement theory, requires significant involvement of the state in the challenged activity so that the action may fairly be treated as that of the state itself. *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974). The second theory, the public function theory, requires that powers and functions traditionally exclusively reserved to the state be conferred on individuals. *Jackson* v. *Metropolitan Edison Co.*, *supra*, at 352-53. The Seventh Circuit found that under the facts of this case state action did not exist under either of these state action theories.

Although the Seventh Circuit acknowledged that its view of the public function theory of state action in lien cases differed from some other circuits (App. to Petition, 19 n. 17), that

* Because these determinations involve essentially the same issue (App. p. 10, Petition) in this brief this concept will be referred to as "state action".

conclusion was not essential to its decision. In fact, the Court recognized that *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970), Petitioners' principal authority on the governmental function theory of state action, can be distinguished on several grounds. It noted that the Texas statute in *Hall* v. *Garson*, gave a landlord the right "to take and retain possession" of "property found within the dwelling" whereas the Illinois Innkeeper's Lien Law, *Ill. Rev. Stat.* c.71, § 2 (1973) did not contain similar language. The Seventh Circuit also noted the obvious factual distinction of this case from *Hall* v. *Garson* between hotel rooms and apartments or houses. Finally, the Court below stated that the Fifth Circuit in *Hall* v. *Garson* may have relied on particular characteristics of prior Texas law in its assertion that the execution of liens in Texas has traditionally been the function of the sheriff or constable. *Hall* v. *Garson, supra* 439. The Seventh Circuit's correct assessment of the importance of this factor in *Hall* v. *Garson* was affirmed by the Fifth Circuit's public function analysis in *Barrera* v. *Security Building Investment Corp.*, 519 F.2d 1166, 1172 (5th Cir. 1975). After noting this peculiarity of prior Texas law, the Seventh Circuit stated that the execution of liens was not a power traditionally and exclusively that of the state and was at most a power shared by the state with private persons. It concluded that there was little similarity between this case and the Supreme Court's public function cases and that therefore the actions were not under color of law for § 1983. (App. to Petition, 19-20) While stating that it disagreed with the result in *Hall* v. *Garson*, the Seventh Circuit also indicated that that case was distinguishable and that the peculiarities of Texas law were an important factor in the Fifth Circuit's public function analysis.

The common law source of the right or power sought to be exercised has been considered important in numerous state action cases. *See, Gibbs* v. *Titleman*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U. S. 1039 (1974) (U. C. C. self-help repossession); *Adams* v. *Southern California First National*

Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U. S. 1006 (1974) (U. C. C. self-help repossession); *Fletcher* v. *Rhode Island Hospital Trust National Bank*, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U. S. 1001 (1974) (bank set-off right). As indicated by the Seventh Circuit, in this case the liens in issue are possessory liens with their roots directly in the self-help, common law innkeeper's lien. (App. to Petition, 16) The exercise of an innkeeper's lien by detaining property that a non-paying guest has brought on a hotel's premises is not the exercise of a public function—rather, it is the type of action which has historically been taken by an innkeeper. Hogan, *The Innkeepers Lien at Common Law*, 8 Hastings L.J. 33, 34-36 (1956). In the case of *Davis* v. *Richmond*, 512 F.2d 201 (1st Cir. 1975) (boarding-house lien) the First Circuit in reviewing the Massachusetts statute stated its view of the source of the power to execute the lien and the public function theory of state action:

> "But there has been no such delegation of power here. Rather, the Massachusetts legislature has made the seizing and holding of property a matter of a private creditor invoking a private remedy. Such self-help is inherently private, and we can find no significant state involvement in the legislature's choice of a point at which to draw the line between permissible individual conduct and the necessity for state intervention." *Id.* at 205.

An analysis of the historical source of the authority asserted such as was made in this case and *Davis* v. *Richmond* is crucial to proper consideration of a public function theory of state action. Comparison of the circumstances of the cases which Petitioners claim are in conflict reveals that differences in who traditionally and exclusively had the authority to assert the lien support the different conclusions. Because of these different circumstances there is not a true conflict between the circuits with respect to state action and innkeeper's liens.

The case of *Culbertson* v. *Leland*, No. 73-1749 (9th Cir., Oct. 3, 1975) (App. C Petition) is also distinguishable from

this case on the basis of the traditional exclusive source of the power in issue. In *Culbertson* v. *Leland* the Ninth Circuit concluded that the lien asserted by defendant was a right which she did not have at common law since only innkeepers and not hotel, boarding house and lodging house keepers had a lien on guests' property. In *Culbertson* v. *Leland* the Ninth Circuit found state action because, in its view, under the facts defendant was not an innkeeper, and the sole source of the authority to detain the property was the statutory lien created by the State of Arizona. (App. to Petition, 29) It took a different view than *Davis* v. *Richardson* as to the effect of a statutory change of the innkeeper's lien and found significant state involvement rather than a minimal impact on private ordering. In this case and in *Davis* v. *Richardson* on the other hand, the possessory nature of the liens asserted and the accompanying private nature of the exercise of the liens was recognized. *Accord, Phillips* v. *Money,* 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U. S. 934 (1975). Under the circumstances of those cases it was concluded that the actions complained of could not fairly be treated as actions of the states.

The public function theory of state action which is Petitioners' principal basis for the claimed conflict between the circuits, requires a careful analysis of whether the power at issue has been traditionally and exclusively reserved to the state. (App. to Petition, 17) Analysis of the cases cited by Petitioner reveals different historical sources of the powers challenged. This case and *Davis* v. *Richardson* are distinguishable from *Hall* v. *Garson* and *Culbertson* v. *Leland* on the basis of the historical differences as to who, under the facts in issue, traditionally and exclusively possessed the powers to assert the liens. The Seventh Circuit's quote in this case of Mr. Justice Clark's caveat in state action cases, that ' "Differences in circumstances . . . beget appropriate differences in law. . . ." Burton v. Wilmington Parking Authority, 365 U.S. 715, 726 (1961) quoting, Whitney v. Tax Commissioner, 309 U.S. 530, 542 (1940)" ' (App. to Petition,

12) also applies to the issue of whether there is a conflict in the circuits. There are sound reasons for the different conclusions on the state action issue in the four principal cases, reasons related to the circumstances of each case which establish that the circuits are not in conflict.

B. The Decision of the Seventh Circuit Court of Appeals in This Case Is Limited in Its Application to Illinois and Does Not Involve a Question of Federal Law Which Must Be Settled by This Court.

Despite the state to state variations of the statutes regulating innkeeper's liens, Petitioners claim "nationwide significance" for this case. Contrary to Petitioners' claims, however, the statutes governing innkeeper's liens are not all virtually identical to Illinois' law. Some apply merely to "hotels and inns," *e.g., Penn. Stat.* tit. 37, § 71; while others refer to "inns, boarding houses, lodging houses and eating houses", *e.g.,* Ga. Code § 52-105. Some statutes give innkeepers the right to "detain" guests' property, *e.g., Ill. Rev. Stat.* c. 71, § 2; while others authorize its "seizure," *e.g., Miss Code* § 75-73-15. Along with variations in the scope and provisions of these statutes there are variations in the common law sources of the liens cited and who has traditionally had the exclusive right to exercise them. *See, Hall* v. *Garson, supra;* Note, *The Innkeeper's Lien in the Twentieth Century,* 13 Wm. & Mary L. Rev. 175, 179-180 (1971).

Because of these statutory variations and the different historical foundations of landlord's liens and innkeeper's liens, 49 Am. Jur. 2d *Landlord and Tenant* § 675 (1970) a decision by this Court on the state action issue would be limited to the Illinois Innkeeper's Lien Laws and not have the scope of impact claimed by Petitioners. It might clarify the law in Illinois, but it would not conclude the state action issue on innkeeper's and landlord's liens on a nationwide basis. In accordance with *Burton* v. *Wilmington Parking Authority, supra,* the courts

below have weighed the facts and circumstances of this case in reaching their state action decisions. This is what should be done in each case and unless this Court rejects that approach a decision by it in this case would not resolve any federal questions with national impact or implications.

In fact, even if this Court should determine that the actions in this case gave rise to claims under 42 U. S. C. § 1983 or the Fourteenth Amendment, that would not constitute a final resolution of the question of whether exercise of innkeeper's liens in Illinois constituted the basis for a federal claim cognizable in the Federal Courts. Illinois has adopted the common law, *Ill. Rev. Stat.* c.28, § 1 (1973) and thus, even if the statutory innkeeper's lines were declared unconstitutional there would still be a common law innkeeper's lien in Illinois. Even if this Court ruled as to state action with respect to the Illinois statutes granting the innkeeper's line, detention of the baggage of non-paying guests in the future would necessarily require a case by case analysis to determine if a common law or a statutory lien was in issue. Finally, a finding of state action here would enable any non-paying guest against whom an innkeeper's lien is asserted to state a federal civil rights claim, converting what is essentially a small claims dispute into a federal action.

What is state action is a question which this Court has on numerous occasions declared to require a factual analysis in each case. Because each innkeeper's lien case requires an analysis of its facts and the historical foundations of the lien, a decision by this Court on the state action issue would have only narrow impact.

C. The Issue of Unreasonable Search and Seizure Has Not Been Briefed or Argued Below and Should Not Be Considered by This Court.

Petitioners present as question for consideration by this Court the claim that the detention of the property of non-paying guests constitutes an unreasonable search and seizure contrary to the

Fourth and Fourteenth Amendments to the United States Constitution. The Seventh Circuit specifically stated that because of its decision in this case it had no occasion to consider the claims made under the Fourth and Fourteenth Amendments. (App. to Petition, 20) Accordingly this Court should not consider those issues in making its decision on the petition for writ of certiorari.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. CREAMER,
EDWARD S. SILBER,
DENNIS M. WILSON,
KECK, CUSHMAN, MAHIN & CATE,
8300 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606,
312 876-3400,
Counsel for Respondents, Drake Hotel, Inc.; Palmer House Company; Hilton Hotels Corporation d/b/a The Conrad Hilton Hotel and 909 North Michigan Avenue Corporation d/b/a Continental Plaza.